No. 8600

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOORE DRYDOCK COMPANY (a corporation),
Appellant,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, MARGARET HOWLAND (a widow), and KENNETH HOWLAND (a minor),
Appellees.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellees.

BRIEF FOR APPELLANT.

I.

JURISDICTION.

This is an appeal from an order of the District Court denying appellant's application for an interlocutory injunction (R. 25) in injunction proceedings (R. 2) instituted by appellant to suspend or set aside a compensation order (R. 13) made by respondent Warren H. Pillsbury, Deputy Commissioner of the 13th Compensation District against appellant and in favor of respondents Margaret and Kenneth Howland pursuant to the alleged authority of the Longshore-

men and Harbor Workers' Compensation Act (33 *U.S.C.A.* Secs. 901 to 950, inclusive, and particularly Sec. 921).

Appellant's application came on for hearing in the District Court upon appellant's verified complaint in equity (R. 2), an order to show cause issued thereon and directed to respondents (R. 22), and the return of order to show cause made by respondent Warren H. Pillsbury. (R. 23.) According to the clerk's certificate filed pursuant to Equity Rule 75 of the Supreme Court of the United States, no evidence was taken and the issue was determined solely from the records enumerated above, and oral argument. (R. 38.)

The jurisdiction of this court upon appeal to review this order of the District Court is created by section 129 of the *Judicial Code,* as amended. (28 *U.S.C.A.* Sec. 227.) The following cases are believed to support the jurisdiction of the court:

The Transfer No. 21, 218 Fed. 636;

Ward Bacon Co. v. Weber, 230 Fed. 142;

Mississippi Valley Trust Co. v. Railway Steel Spring Co., 258 Fed. 346;

Northwestern Stevedoring Co. v. Marshall, 41 Fed. (2d) 28.

The full text of 33 *U.S.C.A.* Sec. 921, the pertinent section of the Longshoremen and Harbor Workers' Compensation Act, and of Section 129 of the *Judicial Code* as amended, 28 *U.S.C.A.* Sec. 227, is set out in the appendix.

II.

STATEMENT OF THE CASE.

On March 21, 1936, appellant was engaged in the conduct and operation of a shipbuilding and ship repair plant situated on the Oakland Estuary in the County of Alameda, State of California, and within the 13th Compensation District established under the provisions of the Longshoremen and Harbor Workers' Compensation Act, and in the course of the conduct of its business it was, on said day, engaged in the operation of a certain power launch or tug known as the "Moore No. 2", 57 feet long, 14 foot beam, and of a tonnage of 16 tons net, in use for the purpose of assisting vessels in and about appellant's shipyard and on and off drydocks contained therein, and navigating, in the business of appellant, the waters of San Francisco Bay and tributaries. (R. 3, 4.)

At all times mentioned herein, appellant was a qualified self-insurer under the Longshoremen and Harbor Workers' Act. (R. 4.)

On March 21, 1936, William H. Howland, husband and father of respondents, Margaret and Kenneth Howland, while performing services for appellant as appellant's employee on the said launch or tug "Moore No. 2", then lying on the navigable waters of the United States at appellant's shipyard, sustained personal injury occurring in the course of and arising out of his employment and resulting in death within a few minutes, in that while making some repairs on the deck of the launch to certain of its equipment, he fell into the water and was drowned. (R. 4, 5.)

After notice and hearing, respondent Warren H. Pillsbury made certain findings of fact (R. 14, 15), upon the basis of which he concluded that the deceased Howland was a harbor worker and not a member of the crew of any vessel, whereupon said respondent made an award under date of May 20, 1937, against appellant and in favor of respondents Margaret and Kenneth Howland. (R. 14, 15, 16.)

On June 3, 1937 (R. 18) appellant, pursuant to the provisions of 33 *U.S.C.A.* Sec. 921, sought to review said compensation order through injunction proceedings by filing a verified complaint in equity for an injunction setting aside and enjoining the enforcement of said award (R. 2), and on the same day the District Judge issued an order to show cause, returnable June 9, 1937, why an interlocutory injunction staying the payment of the award pending final decision should not be issued. (R. 22.) On the return day, respondent Warren H. Pillsbury made a return to the order to show cause (R. 23), and the matter came on for hearing upon the verified complaint and the return, at the conclusion of which the District Court made an order discharging the order to show cause and denying the application for an interlocutory injunction. (R. 25.) From this order this appeal is prosecuted.

The application for the interlocutory injunction was made pursuant to the terms of 33 *U.S.C.A.* Sec. 921, and was predicated upon the allegation of irreparable damage found in paragraph XVI of the verified complaint (R. 10, 11), the language of which is as follows:

"That neither said award, nor any part thereof, has as yet been paid by plaintiff and unless payment of the amounts required by the said award shall be stayed pending final decision in this suit, plaintiff will be required to pay, under the terms of said award, large amounts of money, and in the event that final decision of this suit should be that the said award is void and of no effect, plaintiff will be unable to recover payments made under said award for the reason that the defendants, Margaret Howland and Kenneth Howland, are financially irresponsible and have insufficient means to respond to any judgment which plaintiff might recover against them, to plaintiff's great and irreparable damage."

This allegation was not controverted by any opposing affidavit and its truth was tacitly admitted by the return. (R. 24.) Respondent's contention, however, was that the facts set forth did not and do not constitute irreparable damage. Such is the specific finding made by the District Court in its order denying the interlocutory injunction. (R. 26.)

III.

THE QUESTION INVOLVED.

The question involved is whether financial irresponsibility and lack of means to repay is sufficient evidence of irreparable damage in a case where no recovery can be had from the respondents if the appellant is compelled to make payments under the award pending final adjudication of its validity.

IV.

ASSIGNMENT OF ERRORS.

First. The court erred in discharging the order to show cause why, pending final decree herein, defendants should not be restrained from enforcing the award in suit and in denying the application for the injunction *pendente lite,* to which denial plaintiff duly excepted and its exception was allowed. (R. 29.)

Second. The court erred in holding that the uncontradicted allegations of the verified complaint herein, and particularly the allegations of paragraph XVI thereof, do not constitute irreparable damage within the meaning of Section 21 of the Longshoremen and Harbor Workers' Compensation Act, to which holding plaintiff duly excepted and its exception was allowed. (R. 29.)

Third. The court erred in that by discharging said order to show cause and denying the application for an injunction *pendente lite* the court, in effect, subjected plaintiff to the penalties of Section 14 of said Longshoremen and Harbor Workers' Compensation Act for having failed to pay said award within the time provided by said Act, notwithstanding the fact that plaintiff had in good faith, by the verified complaint herein, challenged the jurisdiction of defendant Warren H. Pillsbury to make the award in suit in the first instance. (R. 29, 30.)

V.

SUMMARY OF ARGUMENT.

1. Irreparable damage had a well defined meaning in equity at the time the Longshoremen and Harbor Workers' Compensation Act was adopted by Congress in 1927. Financial irresponsibility, lack of means to repay and insolvency have, from time immemorial, always been considered sufficient evidence of irreparable damage whenever a litigant has sought temporary relief from a questioned obligation.

2. When Congress provided, in 33 *U.S.C.A.* Sec. 921, that no interlocutory injunction should be issued except upon proof of irreparable damage, it certainly had no apparent intention of using the phrase "irreparable damage" in any other sense or meaning than that which has been ascribed to it for the last hundred years.

3. Consequently, irreparable damage in 33 *U.S.C.A.* Sec. 921 means exactly what it meant in courts of equity prior to and at the time the Act was passed.

4. Appellant's showing of irreparable damage was classical and an interlocutory injunction should have issued in the court below.

VI.

ARGUMENT.

1. IRREPARABLE DAMAGE HAD A WELL DEFINED MEANING IN EQUITY AT THE TIME THE LONGSHOREMEN AND HARBOR WORKERS' COMPENSATION ACT WAS ADOPTED BY CONGRESS IN 1927. FINANCIAL IRRESPONSIBILITY, LACK OF MEANS TO REPAY, AND INSOLVENCY HAVE, FROM TIME IMMEMORIAL, ALWAYS BEEN CONSIDERED SUFFICIENT EVIDENCE OF IRREPARABLE DAMAGE WHENEVER A LITIGANT HAS SOUGHT TEMPORARY RELIEF FROM A QUESTIONED OBLIGATION.

The three assignments of error are designed to raise substantially the same question, namely, that a showing that the respondents are financially irresponsible and lack means to pay, constitutes irreparable damage sufficient to justify the issuance of an interlocutory injunction restraining the enforcement of a questioned award pending final determination on the merits. The three assignments are as follows:

> *First.* The court erred in discharging the order to show cause why, pending final decree herein, defendants should not be restrained from enforcing the award in suit and in denying the application for the injunction *pendente lite,* to which denial plaintiff duly excepted and its exception was allowed. (R. 29.)
>
> *Second.* The court erred in holding that the uncontradicted allegations of the verified complaint herein, and particularly the allegations of paragraph XVI thereof, do not constitute irreparable damage within the meaning of Section 21 of the Longshoremen and Harbor Workers' Compensation Act, to which holding plaintiff duly excepted and its exception was allowed. (R. 29.)

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The only question in this case is a determination of the issue whether or not appellant's showing of irreparable damage was sufficient to entitle it to the protection of an interlocutory injunction pending final determination of the cause. That was the sole question considered in the court below, and for the reason that we believe that neither the district nor this court has any jurisdiction to determine the validity of the compensation award itself, we shall refrain from any discussion of the merits. (*Ex parte National Enameling & S. Co.*, 201 U. S. 156, 50 L. Ed. 707.) We shall content ourselves with the mere observation that if the deceased Howland was a member of the crew of the "Moore No. 2" at the time of his death, he was exempted by 33 *U.S.C.A.* Sec. 903 (a) 1 from the operation of the Act and the award is void. On the other hand, if he was not a member of the crew, the award is valid and the complaint for an injunction to review it in the District Court should be dismissed.

These matters are, however, it is submitted, not before this court at this time.

At the time Congress passed the Longshoremen and Harbor Workers' Compensation Act in 1927, the phrase "irreparable damage" had attained a settled meaning and construction in equity jurisprudence. It is elementary that where the plaintiff has an adequate remedy at law, equity has no jurisdiction. Adequacy, however, means not only that the law must afford a remedy, but also that it must be an effective one. A judgment against a defendant who is financially irresponsible, lacks means to pay, or is insolvent, is no practical remedy at all. Hence, these factors have always been considered by courts of equity in determining whether or not a plaintiff's damage is irreparable. The following cases clearly show that the application of this doctrine is nearly universal throughout the United States. These cases hold that financial irresponsibility, lack of means to pay, or insolvency constitute a showing of irreparable damage. Some of them arose on applications for interlocutory injunction and others upon final decree. The former are marked with a star (*) but the distinction between the two is entirely immaterial because the principles involved in both classes are identical:

Wheeler v. Lack, 37 Ore. 238, 61 Pac. 849;

**Saltus v. Bedford Co.,* 133 N. Y. 499;

Ponder v. Cox, 28 Ga. 305;

Smallman v. Onions, 3 Bro. Ch. 621, 29 Repr. 733;

Hodgson v. Duce, 2 Jurist (N. S.) 1014, 28 L. T. O. S. 155;
Lewis v. Christian, 40 Ga. 187;
Deming v. James, 72 Ill. 78;
Brownston v. Cropper, 1 Litt. 173, 11 Ky. 173;
**Jones v. Stanton,* 11 Mo. 433;
Amoskeag Mfg. Co. v. Shirley, 69 N. H. 269, 39 Atl. 976;
**Phillips v. Trezefant,* 67 N. C. 370;
Chattanooga Grocery Co. v. Livingston, 59 S. W. 470;
Petterson v. Smith, 30 Texas C. A. 139, 69 S. W. 542;
**Title Guaranty etc. Co. v. Brown,* 125 N. Y. S. 780;
**Wolff v. Altman,* 187 N. Y. S. 902;
Friedberg, Inc. v. McClary, 173 Ky. 579, 191 S. W. 300;
Williams v. Harrison, 135 Mo. App. 152, 115 S. W. 1056;
High on Injunctions, 4th Ed. Vol. 1, p. 372, Sec. 400;
Beach on Injunctions, Vol. 1, p. 42, Sec. 34;
American & English Encyclopedia of Law, 2nd Ed. Vol. 16, p. 361.

To the same effect see:
Drury v. Roberts, 2 Md. Ch. 157;
Walton v. Bonham, 24 Ala. 531;
Shoemaker v. S. B. Spark etc. Co., 135 Ind. 471, 35 N. E. 280.

In California alone there are two cases in which it was held that the court would enjoin a trespass where the defendant was insolvent:

Hicks v. Compton, 18 Cal. 206;

West v. Smith, 52 Cal. 322.

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2. **WHEN CONGRESS PROVIDED, IN 33 U.S.C.A. SEC. 921, THAT NO INTERLOCUTORY INJUNCTION SHOULD BE ISSUED EXCEPT UPON PROOF OF IRREPARABLE DAMAGE, IT CERTAINLY HAD NO APPARENT INTENTION OF USING THE PHRASE "IRREPARABLE DAMAGE" IN ANY OTHER SENSE OR MEANING THAN THAT WHICH HAS BEEN ASCRIBED TO IT FOR THE LAST HUNDRED YEARS. CONSEQUENTLY, IRREPARABLE DAMAGE IN 33 U.S.C.A. SEC. 921 MEANS EXACTLY WHAT IT MEANT IN COURTS OF EQUITY PRIOR TO AND AT THE TIME THE ACT WAS PASSED.**

The provision in 33 *U.S.C.A.* Sec. 921 to the effect that payment of the amounts required by an award shall not be stayed pending final decision unless irreparable damage will ensue to the employer is merely declaratory of a universal rule. As has already been stated, the phrase "irreparable damage" had a settled construction at the time of the passage of the Act. There is nothing in the whole context of the Act to show that Congress had any intention of doing other than adopting the settled construction.

However, in the case of *Continental Casualty Co. v. Lawson,* 2 Fed. Sup. 459, Ritter, District Judge of the District Court for the Southern District of Florida, adopted a new and entirely revolutionary interpretation of the phrase. The case arose upon an applica-

tion for an interlocutory injunction staying the payment of the award pending final decision.

The showing of irreparable damage was that the claimant was profligate, wasted his earnings, drank intoxicating liquors to excess, was impecunious, and that his character and financial condition were such that no recovery probably could ever be had from him in the event the compensation order should be set aside in whole or in part. In denying the application the court said:

> "The purpose of the law is where the compensation award may be too heavy for the employer as a self-insurer to pay without practically taking all his property or rendering him incapable of carrying on his business, or where, by reason of age, sickness or other circumstances, a condition is created which would amount to irreparable injury."

It is submitted that taking the Compensation Act by its four corners, it is impossible to find in it any justification for the arbitrary construction of the phrase "irreparable damage" made by Judge Ritter.

He does not deny that the showing made was a classical showing of irreparable damage. He says, in effect, that there is no such thing as irreparable damage except in the case of a self-insurer who would, to all intents and purposes, be practically ruined by payments made under an invalid award which could not be recovered when the invalidity was established. He therefore says that the interlocutory injunction is in practice limited to the case of what is practically a marginal or financially weak self-insurer.

Not only is there no warrant for this construction in the Act of Congress, but it amounts to a gross discrimination against the maritime employer who has secured the payment of compensation by insurance and the adequately financed self-insurer. Irreparable damage is, therefore, made to depend not upon the financial irresponsibility of the claimant, but that of the self-insured employer. The test is no longer inability of a defendant to repay. The determining factor is the self-employer's ability to "take it". If he won't miss the money that he is compelled to pay out unjustifiably, he is forthwith precluded from showing any irreparable damage and obtaining any interlocutory relief.

This case went to the Circuit Court of Appeals for the Fifth Circuit, in *Continental Casualty Co. v. Lawson,* 64 Fed. (2d) 802, and was there reversed but on entirely different grounds, and there was no discussion in the appellate court of the construction of irreparable damage.

As far as we know, the only other case dealing directly with the question of the propriety of issuing an interlocutory injunction pending final decision is the case of *Northwestern Stevedoring Co. v. Marshall,* 41 Fed. (2d) 28, decided by this court May 19, 1930. There is, however, in the case, no discussion of what is necessary to be shown to constitute irreparable damage. The other points discussed in this case have since been decided by the Supreme Court of the United States in *Crowell v. Benson,* 285 U. S. 22, 76 L. Ed. 598, which is now the controlling authority on these

matters. Unfortunately, however, there is in *Crowell v. Benson, supra,* no discussion of the construction of the phrase "irreparable damage". It is quite evident that the District Court adopted the rule laid down by Judge Ritter in *Continental Casualty Co. v. Lawson, supra.* This court found (R. 26), that the allegations of paragraph XVI of the verified complaint (R. 10), do not constitute irreparable damage within the meaning of Section 21 of the Longshoremen and Harbor Workers' Compensation Act, *and for that reason* denied the interlocutory injunction. The question whether this ruling is correct is the sole question presented by this record and its importance is the justification for this appeal.

At the present time the verified complaint is pending in the District Court upon a motion to dismiss which will be argued in the very near future. The decision on this motion will doubtless result in another appeal to this court in which, of course, error could be predicated upon the denial of the interlocutory injunction, but in the appeal on the merits that point would merely be one of several and it was thought that this interlocutory appeal should be taken in such manner as to bring before the court the single question of what is or is not irreparable damage.

3. APPELLANT'S SHOWING OF IRREPARABLE DAMAGE WAS CLASSICAL AND AN INTERLOCUTORY INJUNCTION SHOULD HAVE ISSUED IN THE COURT BELOW.

Under the terms of the Longshoremen and Harbor Workers' Compensation Act (33 *U.S.C.A.* Sec. 921), payments under the award must be made regardless of its validity and the jurisdiction of the Deputy Commissioner unless they are stayed by interlocutory injunction. This particular case involved the payment of $522.00 immediately as of May 1, 1937, the immediate payment of $200.00 for burial expense, and continuing payments of $9.00 a week payable in installments each two weeks or monthly, at the election of the respondents Howland. (R. 8, 9.) A total of $722.00, plus the continuing payments, is to be paid at once. In addition to that, penalties can, and we have been advised by respondent Pillsbury that they will, be assessed under the provisions of 33 *U.S.C.A.* Sec. 914.

On the application for the interlocutory injunction in the District Court, a showing was made that if the money was paid out to the respondents Howland, it could never, because of their financial irresponsibility and lack of means to repay, be recovered from them if the award should ultimately be held invalid.

The injunction proceedings were instituted for the purpose of reviewing respondent Pillsbury's award and determining whether or not the deceased Howland was, at the time of his death, a member of the crew of the "Moore No. 2". If he was a member of that crew, respondent Pillsbury had absolutely no jurisdiction to make the award because, as we have already

mentioned, members of a crew are specifically excepted from the operation of the Act. (33 *U.S.C.A.* Sec. 903-(a)-1.) In instituting the injunction proceedings, appellant was pursuing the only method of review provided by the statute (33 *U.S.C.A.* Sec. 921), and the only method by which it could protect itself from a substantial monetary loss if the award should be held to be invalid was by interlocutory injunction.

It now appears that if there is any way that it can be done, this appellant will be punished for its temerity in seeking to review the award made by respondent Pillsbury. Every effort will be made to assess and collect the penalties, and if appellant is compelled to make these payments before the merits of the litigation can be determined, they can never be recovered. If the award is held to be invalid on final decree, the defendants Howland will simply have been given the money of appellant without any justification. We do not believe that such administration of the Act was ever contemplated by Congress when the Act was passed. If such is the necessary construction of the Act, is not the Act itself unconstitutional in so far as any provision is concerned which is construed in such fashion as to take appellant's money and give it to the respondents Howland when they are no more entitled to it than a complete stranger to the appellant? We have not stressed the constitutional aspect because we cannot believe that this court will so construe the pertinent sections of the Longshoremen and Harbor Workers' Act as to produce such a result, but if such is the necessary construction of the Act, then we affirm

that it is unconstitutional in that respect in that it violates the Fifth Amendment to the Constitution of the United States.

VII.

CONCLUSION.

The application for the interlocutory injunction was made upon the basis of a verified complaint challenging the jurisdiction and power of the respondent Pillsbury to make any award whatsoever. This verified complaint contained allegations of irreparable damage in strictly classic form and these allegations were admitted by the return of the respondent Pillsbury. It is respectfully submitted that the interlocutory injunction should have been granted by the District Court and that its order denying the same should be reversed.

Dated, San Francisco,
September 8, 1937.

Respectfully submitted,
EMMETT CASHIN,
HAROLD M. SAWYER,
Solicitors for Appellant.

(Appendix Follows.)

Appendix.

Appendix

33 *U.S.C.A.* Sec. 921—Review of compensation orders.

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by refer-

ence thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this chapter. (Mar. 4, 1927, c. 509, Sec. 21, 44 Stat. 1436.)

* * * * * * *

28 *U.S.C.A.* Sec. 227 (Judicial Code, section 129, amended). Appeals in proceedings for injunctions and receivers.

Where, upon a hearing in the district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an inter-

locutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 346 and 347 of this title shall apply to such cases in the circuit courts of appeals as to other cases therein. The appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof. The district court, may, in its discretion, require an additional bond as a condition of the appeal. (Mar. 3, 1891, c. 517, Sec. 7, 26 Stat. 828; Feb. 18, 1895, c. 96, 28 Stat. 666; June 6, 1900, c. 803, 31 Stat. 660; Apr. 14, 1906, c. 1627, 34 Stat. 116; Mar. 3, 1911, c. 231, Sec. 129, 36 Stat. 1134; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 937.)